No. 92-1949

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ROBERT L. DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

REPLY BRIEF

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INTRODUCTION

The proper standard for evaluating whether an ambiguous request invokes the right to counsel under *Miranda v. Arizona*, 384 U.S. 436 (1966), asks whether a statement made by a suspect during custodial interrogation could reasonably be understood, in context, as a request for counsel. If so, an ambiguous request should be deemed sufficient to invoke the right to counsel, thus triggering the rule of *Edwards v. Arizona*, 451 U.S. 477 (1981). If the statement can not reasonably be understood in context as a request for counsel, the rule of *Edwards* should not apply. This bright line rule would obviate the need for any clarification.

ARGUMENT

Although the government repeatedly characterizes Petitioner's statement "[m]aybe I should talk to a lawyer" as an "ambiguous reference to counsel," Gov't Br. 15, 19, Petitioner's statement was more than a mere reference to counsel. It expressed a desire to communicate with an attorney. Accordingly, the Petition for *Certiorari* did not ask the Court to review the significance of an ambiguous reference to an attorney. The issue is not whether any passing *reference* to lawyers should be given a talismanic effect; even if clearly expressed, a mere reference to a lawyer does not invoke the right to counsel. Rather, the question presented concerns the legal significance of a suspect's ambiguous *request* for counsel.

Under Petitioner's proposed standard, a suspect's ambiguous statement is sufficient to invoke the right to counsel if it could reasonably be understood, when viewed in context, as a request for counsel. This standard appreciates that statements may be sufficiently ambiguous such that reasonable people could differ concerning whether the suspect intended to invoke the right to counsel. Petitioner's proposed standard considers the inherently coercive context in which such statements are made, and also recognizes the imprecision of common, everyday speech.[1]

By contrast, the government would require that a suspect make his or her desire to consult with counsel "clear," and therefore unmistakable, before the suspect's statement would be considered sufficient to invoke the right to counsel under *Edwards*. Gov't Br.

[1] The government's suggestion that Petitioner has argued that his statement was not ambiguous, Gov't Br. at 30, is not supported in Petitioner's Brief. Petitioner conceded that the statement "[m]aybe I should talk to a lawyer" was ambiguous. Pet. Br. at 15 & n. 19. Though ambiguous by definition, when placed in context and evaluated under the proper legal standard, the statement was sufficient to invoke the right to counsel.

at 28 n.17.[2] Failing such clarity, however, the government would allow the police to question a suspect about whether he or she actually intended to invoke the right to counsel.[3] Such an approach is inconsistent with *Miranda*.

A. A Suspect Experiencing The Pressures Of Custodial Interrogation Should Not Be Required To Express The Desire To Consult An Attorney In Clear And Unmistakable Terms Before Being Afforded The Right.

Even as it advocates a standard requiring that a suspect's invocation of the right to counsel be unmistakably clear, the government recognizes the inherent unfairness of such a rule:

> Insisting on a clear and unambiguous statement from a suspect under the pressures of custodial interrogation would make the right to counsel depend not on the suspect's choice, but on the clarity with which he expresses that choice.

Gov't Br. at 14. The government's proposed rule permitting clarification where a suspect's statement is less than clear conflicts with the government's professed desire to protect the suspect's right to choose between speaking to police and consulting with counsel.

[2] The opportunity for a suspect to demonstrate such "clarity" would only come to pass if the interrogators decide that there was sufficient ambiguity in the request *ab initio*. Only then would the government clarify the request. Thus, the government standard really requires suspects to potentially leap two hurdles prior to effective invocation.

[3] The government argues "not every mention of the word 'lawyer' rises to the level of an ambiguous or equivocal reference that could be intended as an invocation of the right to counsel." Gov't Br. at 30 n.38. While Petitioner maintains that clarification is never appropriate, Petitioner agrees that not every passing reference to an attorney invokes the right to counsel. Pet. Br. at 22. A statement that could reasonably be viewed as an ambiguous request, however, should be sufficient to invoke the right to counsel.

A suspect attempting to invoke the right to counsel may use terms that are not clear and unambiguous, either because the suspect's language skills do not permit such clarity of expression or because his social and cultural background have not inculcated the assertiveness the government standard would require. The government even concedes that this "burden must be viewed in light of the inarticulateness of some suspects and the pressures generated by a custodial setting." Gov't Br. at 22. Under the government's proposed standard, however, such a suspect will face clarifying questions from police officers. Thus, the government's proposed rule would, in essence, carve out an exception to the *Edwards* rule and allow police officers to continue to question suspects whose language skills do not break the threshold of clarity advocated by the government. Such a position is entirely at odds with *Miranda* and *Edwards*.

In essence, the government advocates a rule which subjects the least assertive suspect to greater pressure than the more assertive suspect. Petitioner's standard takes into consideration the fact that all suspects are not created equal. Suspects who are more assertive, intelligent, or experienced at undergoing interrogation may find it easy to forcefully assert their right to counsel. But the timid, less intelligent suspect may be cowed by his or her first exposure to custodial interrogation. That suspect may express the desire for counsel in terms an experienced interrogator may find ambiguous.

The facts in this case demonstrate why a standard requiring a clear and indisputable request for a lawyer to invoke the right to counsel under *Edwards* requires too much of the less-than-stalwart suspect in the heat of custodial interrogation. A low ranking enlisted man in the Navy, Petitioner was questioned by NIS Agents whose investigation had received close cooperation from Petitioner's command, even to the point—as Petitioner knew—that the Agents enjoyed access to the Admiral's stateroom. After more than a week in isolation in a psychiatric ward—where his treating physician happened to be the husband of the lead NIS Agent—Petitioner was arrested by the NIS Agents and taken to

the base NIS office. He was then handcuffed to a chair and interrogated.[4] After an hour of questioning, the NIS Agents confronted Petitioner with questions suggesting that he had murdered Keith Shackleton. They then made very pointed inquiries concerning the bloody T-shirt in his locker.

At this critical point, after he explained that the blood on the T-shirt was the result of the extraction of his wisdom teeth, J.A. 176, Petitioner interrupted the interrogation and stated, "[m]aybe I should talk to a lawyer." J.A. 135, 140, 152, 176. Perhaps ambiguous in the abstract, the words should be sufficient to invoke the right to counsel. The law should not require a homicide suspect, who had been arrested after being kept in isolation in a psychiatric ward for more than a week and was kept handcuffed to a chair, to speak with any greater clarity or force in order to invoke the right to counsel under *Miranda* and *Edwards*. Moreover, Petitioner's use of common hedge words or tag phrases such as "maybe" and "I think" should not undermine the validity of an invocation of the right to counsel.[5]

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[4] The government makes much of Petitioner's initial waiver of his right to counsel, Gov't Br. at 27-28, and implies that Petitioner should therefore have to leap a higher hurdle to invoke the right to counsel should he subsequently decide to do so. Petitioner disagrees with the government's suggestion, and is unaware of any authority that supports the government's proposition. If anything, the fact that Petitioner had at first ostensibly waived his right to counsel suggests that his subsequent statement "[m]aybe I should talk to a lawyer" reflected a change of mind about the need for counsel.

[5] The government argues that it is circular to look to the Agents' treatment of Petitioner's statement as evidence that they understood it as a request for counsel. *See* Gov't Br. at 28 n.37. Petitioner's argument, Pet. Br. at 22-23, however, was broader than the government has characterized it. The Agents' subsequent treatment of the functionally identical statement, "I think I want a lawyer before I say anything else," J.A. 137, shows that the only difference between the two statements was not some metaphysical distinction between one level of ambiguity and another. Instead, the critical difference was that the Agents no longer believed it possible for Petitioner

The government also fails to appreciate—and therefore dismisses the significance of—the military setting within which Petitioner was interrogated. The government argues, and Petitioner agrees, that "the rules of *Miranda* and *Edwards* do not operate differently in the military setting." Gov't Br. at 33. The salient point, however, is that the degree of coercion is radically different because of the training and indoctrination military personnel undergo. Military personnel are conditioned to be different than civilians. Likewise, the military setting differs from the civilian world.

Obedience and submission to authority are ingrained into military personnel from the inception of basic training and are reinforced throughout their careers. Unlike their civilian counterparts, enlisted members of the military are not encouraged to "question authority." Thus, in context, a question directed to a young, low ranking enlisted man has an element of coercion that is simply absent from an identically phrased question asked of a civilian.

There are several reasons why this is so. In the words of one commentator:

> One reason is the apparent power of formal authority. By the time that servicemen reach the combat situation, their experience with formal military discipline should have accustomed them to obedience by demonstrating to them that the [military] does have the power to detect and punish overt resistance or noncompliance by individuals. One of the principal purposes of basic training, for example, is to show the trainees just how easily they can be made to submit to . . . authority. A second reason is that formal authority can be used to define the limits of the

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to incriminate himself any further. Quite simply, the obligation of interrogators to honor a suspect's right to counsel should not depend on the officer's subjective view of whether a statement was sufficiently clear to be an invocation, any more than it should turn on the suspect's strength of will or ability to resist additional questioning from the interrogators.

> serviceman's environment and thus his expectations. A military organization is . . . a "total institution": work, subsistence, and recreation are all under the control of a single authority. Once such an organization has shown its power to completely withhold esteem, comfort, and leisure, it can establish a baseline of expectation from which any increase will appear to be an act of benevolence by the individual responsible.

James H. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C.L. Rev. 177, 224 (1984).

Compliance with authority, even where it may endanger life and limb, is ingrained and expected behavior in the military. Thus, when the NIS Agents began to question Petitioner, his normal and trained response was to comply with their wishes; to cooperate and to answer their questions in the manner he expected that they wanted the questions answered. While the rules of *Miranda* and *Edwards* do not operate differently in this setting, the application of these rules must take into account the very real, albeit subtle, forms of coercion that were at work undermining Petitioner's ability to articulate his request for counsel any more clearly and unmistakably than "[m]aybe I should talk to a lawyer." Petitioner does not advocate a different standard for the military *per se*, but notes the fundamental difference between military and civilian society only to stress that the focus must be on the state of mind of the suspect.

B. Allowing Clarification Of Ambiguous Requests For Counsel Invites Abuse By Overzealous Interrogators And Is Likely To Be Seen By The Suspect Who Makes An Ambiguous Request As An Attempt To Quell That Request Even Where Interrogators Act In Good Faith.

The government discounts the likelihood that clarifying questions will be perceived by a suspect as badgering. Gov't Br. at 22, 23 n.15. However restricted such clarification might be, however,

the very asking of clarifying questions after an ambiguous request will either have a coercive effect, or be likely to be perceived as such by a suspect. Pet. Br. at 24-29. Indeed, the suspect whose request for counsel is ambiguous is the one most likely to be easily coerced. For example, the government does not explain how a suspect who actually intended to invoke the right to counsel, but who was either intimidated by the setting or unable to speak with the precision and clarity the government would require, could view such questioning in any other way.

A lay person without legal training who states 'maybe I should talk to a lawyer' is likely to believe these words sufficient to invoke the right to counsel, especially where the suspect has not been instructed—as Petitioner was not—that any invocation of the right to counsel must be unmistakably clear. From the suspect's viewpoint, *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980), the additional questioning about the request for counsel, will likely be taken as an indication that the police are disinclined to honor the request.

Although the government argues that any clarification must be narrowly limited, the government does not offer any legitimate explanation for why the Agents said that they were not there to violate Petitioner's rights. This statement can only be interpreted as an effort to convince Petitioner that they were preserving his rights, and therefore looking out for his interests, when their goal was to elicit a confession.

Indeed, *Miranda* recognized that such police questioning may be perceived as coercive. In *Miranda*, the Court observed that:

> [e]ven preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Thus the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during *any* questioning if the defendant so desires.

384 U.S. at 470 (emphasis added).[6]

Similarly, *Edwards* acknowledged that questioning would be perceived by suspects as coercive. *See Michigan v. Harvey*, 494 U.S. 344, 350 (1990) (*Edwards* is "designed to prevent police from badgering a defendant from waiving his previously asserted *Miranda* rights."). The Court recently reemphasized this reasoning in *Minnick v. Mississippi*, 498 U.S. 146 (1990). In *Minnick*, the Court held that the police could not reinitiate questioning of a suspect who had invoked the right to counsel even after the suspect had been permitted to consult with counsel. This holding was based, in part, on the Court's recognition that a "single consultation with an attorney does not remove the suspect from *persistent attempts by officials to persuade him to waive his rights, or from the coercive pressures that may accompany custody and that may increase as custody is prolonged.*" *Id.* at 153 (emphasis added).[7]

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[6] The distinction between clarifying an ambiguous statement and advising a suspect about the right to counsel or dissuading a suspect from invoking the right to counsel is, at best, nebulous. In many cases, which side of the line a police officer's conduct falls on is likely to turn on the suspect's resolve and determination rather than any good or bad faith on the part of the interrogating officer. In this regard, the police officer's job requires that he or she come as close to the line as possible without crossing it. *See Fare v. Michael C.*, 442 U.S. 707, 721 (1979) ("probation officer would be bound to advise his charge to cooperate with police"). *See also Oregon v. Elstad*, 470 U.S. 298, 316 (1985).

[7] The reasoning of Justice Scalia's dissent in *Minnick* confirms that police questioning about a suspect's desire to consult with counsel is likely to be seen by a suspect as coercive. Justice Scalia's *Minnick* dissent asserted that the inherently coercive atmosphere of custodial interrogation is dispelled after police honor a suspect's request for counsel, because the suspect then "knows that he has an advocate on his side, and that the police *will permit him to consult that advocate.*" *Id.* at 162 (Scalia J., dissenting) (emphasis added). It follows that, from the suspect's perspective, additional questioning about a suspect's desire to consult with counsel, when counsel has not

In sum, the government's assertion that suspects are likely to understand clarifying questions as evidence "that the police recognize and are prepared to honor [the] right to counsel," Gov't Br. at 23 n.15, is as unsupported by practical expectations as it is by precedent. Quite the contrary, the government's proposed rule has a high cost: the likelihood that suspects who are unable to speak with precision will be questioned about ambiguous requests for counsel and dissuaded, whether deliberately or inadvertently, from insisting on or otherwise pursuing their right to counsel. Ultimately, such a rule would deny equal access to counsel based on a suspect's sophistication or forcefulness in the first instance, and subsequently would deny counsel if such a suspect further lacks sufficient determination and resolve to defend his or her invocation in the face of additional police "clarifying" interrogation.

C. Petitioner's Standard Strikes The Proper Balance Between A Suspect's Absolute Right To Choose Whether To Consult An Attorney And The Government's Desire To Investigate Crimes.

The government suggests that Petitioner's proposed standard will interfere with a suspect's right to choose whether to invoke the right to counsel. Gov't Br. at 25-30.[8] The government's professed concern rings hollow, however, where it proffers as

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been provided, is likely to be seen as evidence that the police will not permit the suspect to consult an attorney.

[8] The government suggests that Petitioner argues for a rule "deeming any reference to a lawyer to be a request for counsel . . . ." Gov't Br. at 27. This is inaccurate. Petitioner has conceded that "not every reference to an attorney by a suspect in custody requires that questioning cease." Pet. Br. at 22. For example, Petitioner agrees with the government that the hypothetical statement "My lawyer told me that they can't convict you of bank robbery if you don't actually go into the bank" does not invoke the right to counsel. Gov't Br. at 30 n.18. A reference to a lawyer that, in context, could not reasonably be understood as a request for counsel does not invoke the right to counsel under *Edwards*.

champion of the suspect's Fifth Amendment rights the same police officer attempting to solicit a confession.

Ultimately, the government's concerns are unfounded. A suspect who does not wish to invoke the right to counsel, but whose interrogation the police halt after an ambiguous statement that could reasonably be considered a request for counsel, is free to refuse any offer of counsel or to reinitiate questioning, thus waiving the right to counsel once invoked.

Whether the Court adopts Petitioner's proposed standard, the government's suggestion or some other standard, there will always be close cases. Petitioner's proposed standard, however, is consistent with *Miranda*, Pet. Br. at 13-15, and is one which the Court had adopted in the context of *Miranda* waivers, Pet. Br. at 19, as well as in the context of the reinitiation of interrogation under *Miranda*, Pet. Br. at 19.

In *North Carolina v. Butler*, 441 U.S. 369 (1979), the Court declined to adopt a *per se* standard prohibiting only explicit waivers of the *Miranda* rights. *Id.* at 375-76. Instead, the Court stressed that a proper evaluation of the issue required examination of the context in which a suspect's statements are made: "the question of waiver must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.' " *Id.* at 374-75 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Petitioner's proposed standard likewise looks to the context in which a suspect's statement is made, and would resolve doubts in favor of the protection of the constitutional right, as did *Zerbst*.[9]

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[9] The government's argument that Petitioner urges this Court to adopt a new standard for the application of *Miranda* in the military setting, Gov't Br. at 33, is misplaced. Petitioner's argument is simply that the military setting provides a large part of the context within which Petitioner's statement must be evaluated.

Similarly, in *Oregon v. Bradshaw*, 462 U.S. 1039 (1983) (plurality opinion), the Court was called upon to determine the legal significance of an "ambiguous" statement made by a suspect in custody. 462 U.S. at 1045 (plurality opinion). Concluding that the suspect's statement "could reasonably have been interpreted by the officer" as reinitiating discussion of the subject of the investigation, the plurality held that this was sufficient to permit the police to resume interrogation. *Id.* at 1045-46 (plurality opinion). To adopt the same standard used in *Butler* and *Bradshaw* is appropriate because the questions in those cases and the issue presented here are the same: what legal effect is to be given a statement made by a suspect during custodial interrogation? Indeed, to adopt the government's proposed standard would be grossly unfair, because to do so would make it easier for a suspect to waive the *Miranda* rights than it would be to invoke them.

By contrast, the government relies on cases that do not focus on the legal significance of a defendant's utterances while in custodial interrogation.[10] *See Moran v. Burbine*, 475 U.S. 412 (1986)

[10] As the government has stated, Gov't Br. at 17 n.12, the Court in *Miranda* referred to Federal Bureau of Investigation guidelines that provided that if a suspect "is indecisive in his request for counsel, there may be some question on whether he did or did not waive counsel. Situations of this kind must necessarily be left to the judgment of the interviewing agent." 384 U.S. at 485 (citing *Hiram v. United States*, 354 F.2d 4 (9th Cir. 1965)). *Hiram*, however, did not present a question about the legal effect of an ambiguous request for counsel. This passage merely refers to the practical implications of the rule announced in *Miranda*, and was not intended to displace the standard reiterated throughout the Court's opinion in *Miranda*: that all questioning must cease when a suspect indicates "in any manner at any stage of the process that he wishes to consult with an attorney." 384 U.S. at 444-45. The reference to the Agent's "judgment" was not intended to authorize the Agent to "clarify" a suspect's intent. Rather, although the Agent must exercise judgment as to whether the suspect has invoked the right to counsel, the "ultimate responsibility for resolving the constitutional question lies with the courts." 384 U.S. at 486 n.55.

(finding police officers' failure to disclose that attorney was attempting to consult with defendant was immaterial to defendant's decision whether to waive *Miranda* rights); *Solem v. Stumes*, 465 U.S. 638 (1984) (holding that rule of *Edwards* not retroactive in application); *Wyrick v. Fields*, 459 U.S. 42 (1982) (per curiam) (standard for assessing waiver of right to counsel is totality of circumstances); *Michigan v. Mosley*, 423 U.S. 96 (1975) (addressing Fifth Amendment right to remain silent under *Miranda*).

The government is also mistaken in suggesting that Petitioner's proposed rule does not provide a brighter line than the rule advocated by the government. Gov't Br. at 24 n.16 (arguing that Petitioner's rule merely draws the line in a different place). Taking one sentence from footnote 34 of Petitioner's Brief out of context, the government misconstrues Petitioner's Principal Brief as suggesting that clarification may be appropriate in some circumstances. That language, however, merely sets forth an alternative argument. To the extent that the Court may hold that clarification is appropriate in some circumstances, Petitioner urges this Court to define those circumstances narrowly: situations where it is "possible, but unlikely, that a suspect is requesting counsel." Pet. Br. at 33 n.34.[11] Likewise, if the Court does permit clarification, it should adopt a strictly limited inquiry such as that proposed by Petitioner. *See* Pet. Br. at 33 n.34.

[11] Where it is probable or likely that the suspect is requesting counsel, there should be no need to clarify the suspect's intent, and, under any standard, the statement should be considered sufficient to invoke the right to counsel. The government, however, would require that a suspect do better than show that his or her intent was *probably* to invoke the right to counsel. Put another way, the government would demand more than a suspect's words demonstrate that it was likely that he or she intended to invoke the right to counsel. Rather, the government would require that the suspect make his or her intent *clear*. Such a burden is simply too great to bear for a suspect undergoing the pressures of custodial interrogation.

Another benefit of Petitioner's proposed standard is the ease with which it could be administered. While a rule permitting clarification would foist yet another rule for police to consider and apply during the dynamic question-by-question interrogation process, Petitioner's proposed rule adheres to the bright line adopted in *Edwards* and reinforced in *Smith v. Illinois*, 469 U.S. 91 (1984) (per curiam) and avoids promulgation of yet another rule—and a nebulous one at that. Moreover, Petitioner's proposed rule would promote equality in the administration of constitutional rights.

In short, Petitioner's proposed standard flows from the Court's prior decisions concerning the legal consequences of a suspect's statements during custodial interrogation. Such a standard further recognizes that ordinary people do not speak with the clarity and precision that the government would have this Court require lay persons to use in order to invoke the fundamental right to counsel. In this regard, the government's professed desire to avoid foisting a lawyer on a suspect who has not expressed a desire to consult with one, Gov't Br. at 20, is disingenuous. On the one hand, a suspect is not harmed if provided with a lawyer for he is free to dismiss counsel. On the other hand, the government would force suspects who do wish to consult with an attorney but who express that desire in less than emphatic terms to undergo a collateral interrogation concerning that desire before it is honored. The bright line rule of *Edwards* was intended precisely to prevent such badgering. *See Smith*, 469 U.S. 98-99 (1984) (per curiam) ("[u]sing an accused's subsequent responses to cast doubt on the adequacy of the initial request *itself* is even more intolerable").

In sum, it is easy for a suspect who does not desire counsel to dismiss such counsel if provided, and no harm is done. On the other hand, requiring a timid suspect to undergo a collateral interrogation on his or her request for counsel may well cause retraction of that request. Petitioner submits that a rule which errs on the side of caution is a rule which evinces proper

regard for so fundamental a Constitutional guarantee as the right to counsel.[12]

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court reverse the judgment of the Court of Military Appeals and remand for appropriate proceedings.

Respectfully submitted,

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[12] Petitioner agrees with the government that 18 U.S.C. § 3501 does not apply to this case.

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